

Fighting Back Against Non-Consensual Pornography

By EMILY POOLE*

Introduction

I do not want anybody to ever be hurt by my [web]site—physically. . . . I don't give a fuck about emotionally. Deal with it. Obviously, I'd get a ton of heat for it. *But*—I'm going to sound like the most evil motherfucker—let's be real for a second: If somebody killed themselves over that? Do you know how much money I'd make? At the end of the day, I do not want anybody to hurt themselves. But if they do? Thank you for the money.

—Hunter Moore¹

HUNTER MOORE, “[t]he most hated man on the Internet,”² is widely known as the king (or super villain) of “revenge porn.”³ The growing phenomenon of revenge porn is the online distribution of sexually explicit photos and videos without the subject's consent.⁴

Moore operated IsAnyoneUp.com, a website that encouraged scorned lovers to send in nude or sexually explicit photos of their exes.⁵ Although the website was not the first to host these types of

* J.D., University of San Francisco School of Law, 2014. Thank you to Erik Shallman and Professor Susan Freiwald for their outstanding help in conceiving and developing this piece. A further thank you to Brittany Roberto for her editing skills.

1. Camille Doder, *Hunter Moore Makes a Living Screwing You*, VILLAGE VOICE 5 (Apr. 4, 2012), <http://www.villagevoice.com/2012-04-04/news/revenge-porn-hunter-moore-is-anyone-up/> (internal quotation marks omitted).

2. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Oct. 11, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.

3. Jessica Roy, *Revenge-Porn King Hunter Moore Indicted on Federal Charges*, TIME (Jan. 23, 2014), <http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/>; Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 21, 2013), <http://nymag.com/news/features/sex/revenge-porn-2013-7/>.

4. *State 'Revenge Porn' Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 23, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx>.

5. *See id.* Moore created the site in 2010. Tsoulis-Reay, *supra* note 3.

photos,⁶ it was unique in its inclusion of the subject's personal information beside the posts.⁷ When a user uploaded photos, the website prompted him to add the subject's full name, city of residence, profession, and social media page links.⁸ Including such information almost guaranteed that the images would show up in a Google search of the subject's name.⁹ Moore has revealed that during its peak, IsAnyoneUp.com received roughly thirty million page views and generated approximately \$10,000 in advertising revenue per month.¹⁰

Moore defended himself from legal responsibility for the images posted on his site by relying on Section 230 of the Communications Decency Act (CDA).¹¹ Section 230 effectively grants immunity to website owners for content submitted by third-party users.¹² Even though Moore freely admitted that he launched the website to cause "public humiliation" and called himself a "professional life-ruiner,"¹³ Section 230 explains why he was able to operate the website for fourteen months without legal challenge.¹⁴ Moore shut down the website in 2012,¹⁵ after law enforcement agents discovered evidence that Moore not only provided a forum for Internet users to post non-consensual images of others, but he also conspired with another man to hack into women's computers to obtain images to post himself.¹⁶

In 2014, a grand jury indicted Moore on charges of conspiracy to commit computer hacking and identity theft.¹⁷ The indictment al-

6. Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 5 (2009).

7. Morris, *supra* note 2.

8. *Id.*

9. *Id.*

10. Dan Goodin, *Feds Arrest "Most Hated Man on the Internet" in Revenge Porn Hacking Case*, ARSTECHNICA (Jan. 23, 2014, 1:58 PM), <http://arstechnica.com/tech-policy/2014/01/feds-arrest-most-hated-man-on-the-internet-in-revenge-porn-hacking-case/>.

11. Roy, *supra* note 3; 47 U.S.C. § 230 (2012).

12. 47 U.S.C. § 230(c)(1).

13. Rheana Murray, *IsAnyoneUp? Shuts Down: 'Revenge Porn' Forum Bought by Anti-Bullying Website*, N.Y. DAILY NEWS (Apr. 20, 2012, 9:00 AM), <http://www.nydailynews.com/news/money/isanyoneup-shuts-revenge-porn-forum-bought-anti-bullying-website-article-1.1064608> (internal quotations omitted).

14. See 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

15. Kashmir Hill, *How Revenge Porn King Hunter Moore Was Taken Down*, FORBES (Jan. 24, 2014), <http://www.forbes.com/sites/kashmirhill/2014/01/24/how-revenge-porn-king-hunter-moore-was-taken-down/>.

16. See Indictment for United States v. Moore, No. CR13-00917 (C.D. Cal. Dec. 20, 2013) [hereinafter Moore Indictment], available at <http://www.scribd.com/doc/201777072/hunter-moore-charles-evens-revenge-porn-indictment>.

17. *Id.*

leges that Moore hired Charles “Gary” Evens to hack into women’s computers to steal sexually explicit images of the women, which Moore then uploaded to his site to drive more web traffic.¹⁸

Although Hunter Moore is facing federal charges for his behavior, other revenge porn website operators and hundreds of thousands of revenge porn distributors still sit serenely in front of their computer screens, fearless of legal repercussion.¹⁹ Because Moore illicitly gained access to some of the photos on his site, the Federal Bureau of Investigation (FBI) was able to rely on the Computer Fraud and Abuse Act (CFAA), a federal statute that criminalizes computer hacking and identity theft, for his arrest.²⁰ But many revenge porn distributors obtain images without hacking into a computer—women send the distributors “selfies,”²¹ or the distributors capture images with the women’s consent—making the CFAA inapplicable.

In the average revenge porn case, a couple—let’s call them Amy and Ben—are either sharing an intimate moment, and Ben snaps a photo of Amy, or Amy sends a selfie to Ben. Amy has no reason to distrust Ben or to suspect that Ben will later share the private images with the Internet. But when Amy breaks up with Ben, Ben becomes angry and upset. He logs onto a revenge porn website and uploads the intimate photos Amy shared with him, along with Amy’s name, city, employer’s name, and social media page links. Suddenly, other users of the site begin harassing Amy by email and posting hateful comments to her Twitter account. These users even target Amy’s work—her employer asks her why the company has been receiving hate mail in her name. Amy is betrayed, confused, and scared, but since she consented to Ben’s possession of the photos, Amy has little recourse against Ben or the website where he posted the images.

The story of Ben and Amy represents a typical revenge porn scenario—the situation includes an image captured or obtained consensually, two intimate partners, a break-up, and a revenge post of the image. But this is not the only scenario in which the non-consensual distribution of sexually explicit images occurs. Sometimes, friends, classmates, or co-workers of an individual obtain and distribute such

18. *Id.*

19. See *infra* Part II (discussing the inadequacy of both civil and criminal laws for targeting non-consensual pornography distributors).

20. 18 U.S.C. § 1030 (2012).

21. A “selfie” is a “photograph that one takes of oneself with a digital camera or a front-facing smartphone . . . especially for posting on a social-networking or photo-sharing website.” *Selfie Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/selfie> (last visited Mar. 14, 2014).

images.²² Or friends, exes, or strangers hack into individuals' computers to acquire images to distribute later.²³ And in some instances, the distributors capture and post images without the individuals' knowledge or consent.²⁴

Although popular media tends to use the term "revenge porn" to describe all of the scenarios just mentioned, a more accurate label is non-consensual pornography (NCP). NCP, of which revenge porn is a subset,²⁵ includes the distribution of any sexually explicit image of an individual without her²⁶ consent, regardless of how the distributor obtained the image and regardless of whether the situation involved an ex.²⁷ This Article, therefore, uses the term NCP to clarify that the revenge porn problem expands beyond vengeful ex-lovers.

NCP distributors remain largely unpunished. Current state and federal laws only prohibit certain NCP scenarios and provide victims with remedies in narrow situations.²⁸ To date, New Jersey, California, Idaho, Utah, and Wisconsin have passed statutes criminalizing NCP.²⁹ While these states should be applauded for their efforts, Utah's statute

22. See *Ask Reddit*, REDDIT, http://www.reddit.com/r/AskReddit/comments/1upmim/those_who_have_naked_pictures_on_the_internet_how/ (last visited June 4, 2014) (displaying various users answering the question: "Those who have naked pictures on the internet; how did they get there and how has it affected your life?").

23. See Roy, *supra* note 3; Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, THE ATLANTIC (Feb. 4, 2014, 1:03 PM), <http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/> (estimating that forty percent of non-consensual pornography is obtained through hacking).

24. See *infra* Part I (describing how distributors can obtain an image without the subject's consent, capture it without the subject's knowledge, or hack it from the subject's computer).

25. See Mary Ann Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <http://www.concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> (explaining that "revenge porn" is a potentially misleading term because the problem is not limited to instances of individuals distributing explicit images of their ex-partners in retaliation of a break-up).

26. Due to the gendered dimensions of NCP, this Article uses masculine pronouns when referring to the distributor of NCP and feminine pronouns to refer to the victims of NCP. Note, however, that women are also culpable of distributing NCP, and men are also victims of the act. See *infra* Part I.B.

27. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014). Unlike revenge porn, which refers to images given consensually to a lover who later distributes them without consent to embarrass or shame the subject, NCP includes images obtained both with and without the subject's consent and distributed by any individual, ex-lover or otherwise. See *id.*

28. See generally discussion *infra* Part II.

29. N.J. STAT. ANN. § 2C:14-9 (West 2014); CAL. PENAL CODE § 647(j)(4)(A) (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014); IDAHO CODE ANN. § 18-6609 (2014); WIS. STAT. § 942.09(1)(d) (2014).

is the only one to cover most forms of NCP while not overly restricting free speech.³⁰ The New Jersey, Idaho, and Wisconsin statutes raise serious First Amendment concerns,³¹ and the California statute covers only limited instances of NCP.³² These states, as well as states lacking any legislation, need to enact statutes that better criminalize the various forms of NCP. Therefore, this Article proposes a model statute that comprehensively and constitutionally criminalizes NCP.

Part I of this Comment begins with a brief history of NCP. Focusing on the gendered dimensions of NCP, Part I then describes the harms that victims, particularly female victims, experience when they find intimate images of themselves on the Internet. Part II describes the current legal routes that victims and law enforcement agents can take to bring action against NCP distributors and website leaders, and explains why such routes are insufficient to properly address the various forms of NCP. Part III proposes a model statute that criminalizes NCP. Part IV explains why the model statute is better than current legislation and is consistent with First Amendment protections of speech.

I. What Is Non-Consensual Pornography?

NCP, which encompasses a broad range of images and behavior, is the act of distributing sexually explicit photos or videos over the Internet without the subject's consent and with the intent to embarrass or shame the subject.³³ The distributor may have obtained the image with the subject's consent, captured it without the subject's knowledge, or hacked it from the subject's computer.³⁴ Generally, the distributor includes the subject's full name, age, location, links to the subject's social media accounts, or details about the subject alongside the image.³⁵

The implied message behind posting this information is to urge Internet users to harass the subject. For instance, when a user arrives at the homepage of MyEx.com, an NCP website, he can view clothed images of a posted individual or click on a "nude photos" link.³⁶ Beneath the images, both the distributor and other users can leave re-

30. See discussion *infra* Part II.D.3.

31. See discussion *infra* Part II.D.1.

32. See discussion *infra* Part II.D.2.

33. See *State 'Revenge Porn' Legislation*, *supra* note 4.

34. See Roy, *supra* note 3; Ask Reddit, *supra* note 22; Levendowski, *supra* note 23.

35. *Add Your Ex: Their Basic Info*, MyEx.COM, <http://www.myex.com/add-your-ex/> (last visited Nov. 28, 2014).

36. See MyEx.COM, <http://www.myex.com/> (last visited Nov. 28, 2014).

marks about the subject.³⁷ The remarks that appear under the nude images tend to fall along the lines of “another skanky white girl,” “snaggle tooth slut,” “dirty whore,” or “lying cheating slut.”³⁸

The terms “revenge porn” and “non-consensual pornography” are relatively new, but the idea of publishing sexually explicit photos of women without their permission dates back at least as far as the 1980s.³⁹ The following section briefly describes the history of NCP and some of the most popular past and current NCP websites. It then explains why NCP is a gendered crime, overwhelmingly affecting the female population, and describes the detrimental effects of NCP on women.

A. History of Non-Consensual Pornography

In the 1980s, *Hustler Magazine* began publishing an issue called “Beaver Hunt,” which featured reader-submitted photos of nude women.⁴⁰ Some readers submitted these photos without the women’s knowledge or consent.⁴¹ Upon discovering their private photos in the magazine, numerous women filed suit against *Hustler*.⁴² In many of these cases, *Hustler* was found liable for invasion of privacy and was required to compensate the women for the emotional distress the magazine had caused.⁴³

The growth of the Internet in the 1990s made sharing photos and videos, including explicit photos and videos, easier than ever. In 2000, Italian researcher Sergio Messina coined the term “realcore pornography” to describe the emerging trend of sharing images of ex-girlfriends in small Internet communities.⁴⁴ By 2008, pornography website XTube claimed to receive multiple complaints a week related to sexual photos and videos posted by angry exes without the complainants’ knowledge.⁴⁵ Around this time, certain pornography websites began marketing themselves as forums for men to upload sex tapes containing their ex-girlfriends, using descriptions like the fol-

37. *See id.*

38. *See id.*

39. *See infra* Part I.A.

40. *See Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1086 (5th Cir. 1984).

41. *See id.*; *Ashby v. Hustler Magazine, Inc.*, 802 F.2d 856, 857–58 (6th Cir. 1986); *Gallon v. Hustler Magazine, Inc.*, 732 F. Supp. 322, 324 (N.D.N.Y. 1990).

42. *Wood*, 736 F.2d 1084; *Ashby*, 802 F.2d 856; *Gallon*, 732 F. Supp. 322.

43. *Wood*, 736 F.2d at 1093–94 (affirming the district court’s judgment regarding *Hustler*’s liability under the “false light” theory and the damages award of \$150,000); *see also Gallon*, 732 F. Supp. at 325, 326.

44. Tsoulis-Reay, *supra* note 3.

45. *Id.*

lowing: “This site was made for all you dudes out there who know what [I]’m talking about and have filmed themselves fucking. Did you save the footage? Well, this is where you can get the ultimate revenge.”⁴⁶ While, in reality, much of the footage on these websites was staged to simply resemble user-generated porn, the market for NCP had been realized.

1. IsAnyoneUp.com

In 2010, Hunter Moore launched IsAnyoneUp.com.⁴⁷ His website urged users to submit the subjects’ names and other personal information alongside the non-consensually posted photos and videos.⁴⁸ Before shutting down the site in April 2012,⁴⁹ after learning the FBI was investigating him, Moore allegedly received approximately 350,000 visitors a day.⁵⁰

It is important to note that had Moore simply operated the revenge porn website and not hacked into women’s computers, the FBI would have had difficulties shutting down the website due the immunity provided to service providers under Section 230; operating an unsavory website is not in and of itself illegal. It is possible, however, that if Moore was responsible for the creation or development of the information on the website, he could have been treated as an information content provider, an entity not entitled to Section 230 immunity.⁵¹

2. UGotPosted.com

The initial success and popularity of IsAnyoneUp.com inspired others to create similar websites. Following Moore’s lead, in 2012, Kevin Bollaert, a San Diego man, allegedly created UGotPosted.com, a website that invited exes to post intimate photos of their former part-

46. REAL EX GIRLFRIENDS, www.realexgirlfriends.com (last visited Mar. 28, 2014); *see also* I KNOW THAT GIRL, www.iknowthatgirl.com (last visited Mar. 28, 2014) (“Real Teen Ex-Girlfriends!”).

47. Tsoulis-Reay, *supra* note 3.

48. Morris, *supra* note 2.

49. Neal Karlinsky et al., *Anti-Bullying Website Takes Over, Shuts Down ‘Revenge Porn’ Website*, ABC NEWS (Apr. 19, 2012), <http://abcnews.go.com/US/anti-bullying-website-takes-shuts-revenge-porn-website/story?id=16174425>. Moore sold the site to Bullyville.com, a support site for bullied victims. *Id.*

50. Morris, *supra* note 2.

51. *See* discussion *infra* Part II.A (distinguishing Internet service providers from information content providers for purposes of immunity under Section 230); Fair Housing Council of San Fernando v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008) (finding that Section 230 immunity did not extend to an interactive website that provided users with a questionnaire that violated the Fair Housing Act).

ners, as well as their names and links to their social networking pages.⁵² Bollaert took it a step further than Moore by creating a second website, ChangeMyReputation.com,⁵³ which he used to contact the subjects of the images to alert them of the photos and offer image removal for a fee of between \$300 and \$350.⁵⁴ Between December 2012 and September 2013, users reportedly uploaded images of more than 10,000 individuals to UGotPosted.com, and Bollaert received more than 2,000 emails requesting image removal, along with thousands of dollars in removal fees.⁵⁵

In December 2013, California Department of Justice agents arrested Bollaert and charged him with thirty-one counts of identity theft, extortion, and conspiracy.⁵⁶ In California, identity theft laws make it illegal to willfully obtain someone's personal identifying information, such as name and address, for any unlawful purpose.⁵⁷ The complaint alleges that Bollaert committed identity theft by willfully and unlawfully obtaining identifying information of the women posted on his website, and by using that information for the following unlawful purposes: (1) to harass and annoy the women, and (2) to obtain and attempt to obtain credit, goods, services, and money of the women.⁵⁸

The prosecutors cast a wide net,⁵⁹ yet it seems unlikely the identity theft charge will be successful. Keeping in mind that Section 230

52. Tim Walker, *Man Who Got Rich from 'Revenge Porn' Website UGotPosted Is Finally Exposed*, INDEPENDENT (Dec. 12, 2013), <http://www.independent.co.uk/news/world/americas/man-who-got-rich-from-revenge-porn-website-ugotposted-is-finally-exposed-9001709.html>.

53. CHANGE MY REPUTATION (Sept. 8, 2013), <http://web.archive.org/web/20130908135232/http://changemyreputation.com/> (accessed by searching for ChangeMyReputation.com in the Internet Archive).

54. *Id.*

55. *Id.*

56. Tony Perry, *San Diego Man Arrested in 'Revenge Porn' Website Case*, L.A. TIMES (Dec. 10, 2013), <http://articles.latimes.com/2013/dec/10/local/la-me-revenge-porn-20131211>.

57. CAL. PENAL CODE §§ 530.5(a), 530.55(b) (West 2014).

58. Complaint at 3, *California v. Bollaert* (Dec. 10, 2013) [hereinafter Bollaert Complaint], available at http://oag.ca.gov/system/files/attachments/press_releases/Complaint_3.pdf.

59. In July 2014, a San Diego County Superior Court ruled that the prosecutors can pursue all thirty-one charges against Bollaert at his trial at the end of 2014. Megan Geuss, *Judge Says California Can Prosecute Alleged "Revenge Porn" Site Operator*, ARSTECHNICA (June 17, 2014), <http://arstechnica.com/tech-policy/2014/06/judge-says-california-can-prosecute-alleged-revenge-porn-site-operator/>. At the time this Article went to print, Bollaert's trial had not reached a verdict. Dana Littlefield, *Nude Pics Posted Online Humiliated Women*, U-T SAN DIEGO (Jan. 23, 2015), <http://www.utsandiego.com/news/2015/jan/23/revenge-porn-website-explicit-pictures/?#article-copy>.

immunizes website operators from liability for the publications of third-party users, there is a strong argument that Bollaert himself did not obtain the women's personal information. Rather, third-party users posted the information to Bollaert's website. There is a further argument that the third-party users were the ones to harass and annoy the women and publicly disclose private facts, not Bollaert. Nonetheless, there is a small, but possible, chance that the prosecutors can make the identify theft charge stick if they argue Bollaert acted along with the third parties to obtain the information due to the manner in which the website urged users to submit the women's information.⁶⁰ If Bollaert is found to be a co-developer, then Section 230 will not immunize him from liability for the content posted on the website.

The complaint also alleges Bollaert committed extortion by running ChangeMyReputation.com,⁶¹ but the extortion claim has its own problem. In California, extortion is "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear."⁶² The fear necessary to constitute extortion must be induced by a threat to do one of five acts.⁶³ Two of the five acts enumerated in California law are relevant to Bollaert. They are threats to (1) "expose, or impute to him, her, or them a deformity, disgrace, or crime," and to (2) "expose a secret affecting him, her, or them."⁶⁴ Both of these acts require a threat to expose information.

To evade the extortion claim, Bollaert could argue that he was simply charging a processing fee to remove images posted by a third party. Bollaert did not threaten to reveal information about the women; the women's private information had already been revealed by the time he requested removal fees. No matter how deplorable his behavior, Bollaert did not threaten to reveal additional information about the women. He offered to *remove* public information in exchange for a fee—such behavior might not suffice to meet the elements of extortion.

60. See discussion *infra* Part II.A (distinguishing Internet service providers from information content providers for purposes of immunity under Section 230); Fair Housing Council of San Fernando v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008) (finding that Section 230 immunity did not extend to an interactive website that provided users with a questionnaire that violated the Fair Housing Act).

61. See Bollaert Complaint, *supra* note 58, at 3 (alleging that Bollaert collected over \$10,000 via ChangeMyReputation.com from individuals who paid to have their personal identifying information and images removed from UGotPosted.com).

62. CAL. PENAL CODE § 518 (West 2014).

63. CAL. PENAL CODE § 519 (West 2014).

64. *Id.*

3. Texxxan.com

Texxxan.com was an NCP website that targeted Texas women.⁶⁵ The site gained popularity in small Texas towns, where community members might easily recognize the female NCP subjects in grocery stores or when walking down the street.⁶⁶ When one of the subjects, Hollie Toups, contacted Texxxan.com and asked the website to remove her images, the website operator requested her credit card information in exchange for removal.⁶⁷

In 2013, nearly twenty women who had their images posted to Texxxan.com joined Toups in filing a class action suit against the website and its host GoDaddy for invasion of privacy and mental anguish.⁶⁸ GoDaddy, like Texxxan.com, argued that Section 230 immunized the web host from liability for content posted by third parties and filed a motion to dismiss.⁶⁹ The district court denied GoDaddy's motion, but the court of appeals reversed the decision.⁷⁰ The plain-

65. TExxxAN.COM (Dec. 17, 2012), <https://web.archive.org/web/20121217021042/http://texxxan.com/> (accessed by searching for Texxxan.com in the Internet Archive index).

66. See Plaintiffs' Original Petition for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction at 7, *Toups v. GoDaddy.com, LLC*, No. D120018-C (Tex. Dist. Ct. Jan. 18, 2013) [hereinafter Plaintiffs' Original Petition, *Toups v. GoDaddy*], available at <http://www.scribd.com/doc/121463764/Class-Action-Suit-Against-GoDaddy-com-Texxxan-com>; Jessica Roy, *Victims of Revenge Porn Mount Class Action Suit Against GoDaddy and Texxxan.com*, BETABEAT (Jan. 21, 2013, 10:58 AM), <http://betabeat.com/2013/01/victims-of-revenge-porn-mount-class-action-suit-against-godaddy-and-texxxan-com/>.

67. Roy, *supra* note 66.

68. Plaintiffs' Original Petition, *Toups v. GoDaddy*, *supra* note 66, at 1, 4. Toups also filed individual suits against Google, Yahoo, and MyEx.com, another revenge porn site. Complaint at 2–4, *Toups v. Google, Inc.*, No. 1:14-cv-00127 (E.D. Tex. Mar. 6, 2014), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1658&context=historical>. She alleged that she owned copyrights in the nude photos of herself accessible through the service providers' websites, served the service providers with proper takedown notices, and the providers failed to remove the images in violation of copyright law. *Id.* In September 2014, the presiding judge dismissed each of her claims. Order of Dismissal, *Toups v. Google, Inc.*, No. 1:14-cv-00127 (E.D. Tex. Sept. 19, 2014), available at <http://www.plainsite.org/dockets/24qkvvgaz/texas-eastern-district-court/toups-v-google-inc-et-al/>.

69. Defendant GoDaddy.com, LLC's Notice of Motion and Motion to Dismiss Pursuant to Rule 91a of the Texas Rules of Civil Procedure, *Toups v. GoDaddy.com, LLC*, No. D120018-C (Tex. Dist. Ct. Mar. 14, 2013) [hereinafter Defendant GoDaddy.com's Motion to Dismiss], available at <http://digitalcommons.law.scu.edu/historical/372/>.

70. *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 760–61 (Tex. App. Apr. 10, 2014). On April 10, 2014, the appeals court found that Section 230 clearly immunizes GoDaddy, as an interactive computer service, from damages arising from the complaint. *Id.*; Jeff Sis-trunk, *GoDaddy Escapes Class Action Against 'Revenge Porn' Site*, LAW360 (Apr. 10, 2014, 5:33 PM), <http://www.law360.com/articles/527214/godaddy-escapes-class-action-against-revenge-porn-site>.

tiffs sought review by the Texas Supreme Court, which was denied in late 2014.⁷¹

4. MyEx.com

When a user clicks on “Submit Your Ex” on MyEx.com, he is taken to a page where he is prompted to enter his ex’s full name, gender, location, age, and Facebook and Twitter links, along with details of the breakup.⁷² Until August 2014, once the post went live, a “Remove my Name” link would appear alongside the woman’s name.⁷³ If the woman clicked on the link, she would arrive at RemoveManager.com, where she could wire transfer \$400 to an address in South Africa to have her record deleted from the website.⁷⁴ Once the money was wired, she was required to email RemoveManager.com with certain identifying information, as well as the MyEx.com profile from which she wished her name and images to be removed.⁷⁵

B. Non-Consensual Pornography Is a Gendered Crime

At first glance, a website like MyEx.com does not seem to target women, as any jilted lover can submit photos of an ex to the website.⁷⁶ The website caters to both genders—the homepage contains links to view pictures of “Just Girls” or “Just Guys.”⁷⁷ Beyond first glance, however, it becomes clear that the number of males posted on NCP sites pales in comparison the number of females.

On one particular visit to MyEx.com, women represented eighty-nine of the first one hundred posted subjects, or 89%.⁷⁸ At the time, the site contained 6,980 total posts of females and 1,390 total posts of

71. Order Denying Petition for Review, *Toups. v. GoDaddy.com, LLC*, No. 14-0408 (Tex. Nov. 21, 2014), available at <http://www.txcourts.gov/supreme/orders-opinions/november-21,-2014.aspx>; see *infra* Part II.A.

72. *Add Your Ex: Their Basic Info*, *supra* note 35.

73. MyEx.COM, <http://www.myex.com/> (last visited Nov. 28, 2014).

74. *Reputation Manager*, REMOVE MANAGER (Apr. 6, 2014), <https://web.archive.org/web/20140406235332/http://removemanager.com/payment/?site=myex> (accessed by searching for RemoveManager.com in the Internet Archive).

75. See *id.* As of November 2014, MyEx.com requests that users who have had their intimate images posted to MyEx.com without authorization contact the website operators through a “Contact Us” link on the site rather than use RemoveManager.com. See *Contact Us*, MyEx.COM, <http://www.myex.com/contact-us/> (last visited Nov. 28, 2014).

76. *Add Your Ex: Their Basic Info*, *supra* note 35.

77. MyEx.COM, <http://www.myex.com/> (last visited Nov. 28, 2014).

78. *Id.* (visited Apr. 20, 2014). On this visit, I noted the genders of the subjects in the most recent one-hundred posts. I then averaged the number of post views these male and female subjects had received.

males, meaning posted subjects were 83% female.⁷⁹ In looking at how many people *viewed* the individual posts, most of the women had between 20,000 and 30,000 views, while most of the men had between 2,500 and 3,000 views.⁸⁰ Not only were female victims posted four to five times as often as males, but also, once posted, their pictures were viewed almost ten times as often. These patterns of posting and viewing are indicative of the gendered nature of NCP.

The growing, online phenomenon of NCP highlights the pervasive existence of gender inequality on the Internet.⁸¹ NCP overwhelmingly affects females as compared to males.⁸² Hard statistics on NCP are hard to come by, possibly because NCP on the Internet is such a recent phenomenon that data simply has not yet been collected, but also because victims may be embarrassed to reveal that someone posted their intimate photos on the Internet. This same phenomenon occurs in sexual assault cases, where more than half of all victims do not report the assault,⁸³ not wanting to call attention to the incident or believing it to be a “personal matter.” Despite the lack of hard data, one study estimates that upwards of 80% of NCP victims are women.⁸⁴

Some suggest that NCP’s purpose is to provide an outlet for the hatred, violation, and harm inflicted upon women.⁸⁵ When NCP victims sued Texxxan.com, website operators put a message on the website homepage stating, “Maybe [sic] the site provided an outlet for anger that prevented physical violence (this statement will be very controversial but is at least worth thinking about).”⁸⁶ Apparently, Texxxan.com operators believed that NCP on the Internet could prevent men from physically acting on their rage through violence against women. The purpose of the site, then, was to translate this anger into the public shaming and humiliation of women.

79. *Id.*

80. *Id.*

81. See generally Danielle Keats Citron, *Cyber Civil Rights*, 89 BOSTON U. L. REV. 61 (2009) (discussing women as primary targets of anonymous cyber mobs).

82. See Natalie Webb, *Revenge Porn by the Numbers*, END REVENGE PORN (Jan. 3, 2014), <http://www.endrevengeporn.org/revenge-porn-infographic/>.

83. *Reporting Rape, RAPE, ABUSE & INCEST NATIONAL NETWORK*, <https://www.rainn.org/get-information/statistics/reporting-rates> (last visited June 14, 2014).

84. Webb, *supra* note 82 (“90 percent of revenge porn victims . . . [are] women.”); Levendowski, *supra* note 23 (“It’s also worth mentioning that upwards of 80 percent of revenge porn victims are women.”).

85. Jill Filipovic, *‘Revenge Porn’ Is About Degrading Women Sexually and Professionally*, THE GUARDIAN (Jan. 28, 2013, 5:23 PM), <http://www.theguardian.com/commentisfree/2013/jan/28/revenge-porn-degrades-women>.

86. *Id.*

Many opponents arguing against the criminalization of NCP claim that it was Amy's fault for posing nude in the first place.⁸⁷ If she had never taken her clothes off in front of Ben, the photos would have never made it onto the Internet—Amy assumed the risk when she shared an intimate moment with Ben. These opponents are essentially telling women that it is their fault that the men in their life posted sexually explicit photos of them on the Internet—that the women are responsible for the men's behavior and they should have known better than to send, or even take, intimate photos.

This assumption of the risk argument is a form of gender discrimination, harming the psyches of every female who has been made to feel bad or ashamed about her sexuality, and perpetuating the belief that females, unlike males, should be shamed when personal information about their sexuality is made public. While men are applauded for their sexual activity, women are judged. Men are "studs"; women are "sluts."⁸⁸ When women are punished for behavior in which men can freely engage, their freedoms are curtailed, and they become less than men.⁸⁹

One Internet scholar, Eric Goldman, suggests that the solution to "the revenge porn 'problem'" is to change the way we feel about nude and sexual depictions—that as such depictions become more widespread, "we as a society will necessarily have to adjust our social norms about the dissemination of nude or sexual depictions to reflect their ubiquity."⁹⁰ While Goldman agrees that websites hosting NCP are "distasteful," he finds no need for a legal response.⁹¹ Pointing to the failures of offensive websites like JuicyCampus.com, Peoplesdirt.com, and IsAnyoneUp.com, he argues that public disapproval and unfavorable media coverage are enough to pressure website operators into shutting down their sites—that the marketplace, rather than the law, can take care of NCP websites.⁹² Finally, he argues that if an individual "prefer[s] not to be a revenge porn victim or otherwise have intimate

87. See, e.g., Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, FORBES (Jan. 28, 2013, 1:13 PM), <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/>.

88. JESSICA VALENTI, *HE'S A STUD, SHE'S A SLUT AND 49 OTHER DOUBLE STANDARDS EVERY WOMAN SHOULD KNOW* 14–15 (2008).

89. See Mary Anne Franks, *Adventures in Victim Blaming*, CONCURRING OPINIONS (Feb. 1, 2013), <http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html>.

90. Goldman, *supra* note 87.

91. See *id.*

92. *Id.*

depictions of [herself] publicly disclosed,” she should simply not take nude photos or videos.⁹³ This view, however, ignores two realities.

The first is that most romantic relationships involve the exchange of personal information that would be embarrassing if revealed.⁹⁴ Sharing intimate moments and exchanging intimate items and information is fundamental to a healthy relationship. Suggesting that partners stop sharing intimate information is unreasonable, particularly given that almost 50% of adults use their mobile devices to send or receive “intimate content.”⁹⁵

The second, and more important, is that NCP has tangible effects on and causes great harm to its victims. Victims are often so ashamed and embarrassed that they feel scared to leave their houses or go online.⁹⁶ They may receive anonymous threats of rape or hateful comments, which add to the fear that they might be physically assaulted if they go out in public.⁹⁷ NCP victims have even committed suicide to escape their tormentors.⁹⁸ NCP victims are harassed, blackmailed, and made to feel ashamed and embarrassed.⁹⁹ And it goes beyond mere personal embarrassment—some of the victims who sued Texxxan.com claimed to have lost their jobs after their pictures surfaced online.¹⁰⁰

In 2011, Holly Jacobs, a PhD student, awoke to find someone had posted intimate photos and videos of her online.¹⁰¹ Within a matter of

93. *Id.*

94. See Filipovic, *supra* note 85.

95. *How We Expose Ourselves Today*, McAfee, <http://promos.mcafee.com/offer.aspx?id=605366&culture=en-us&cid=140612> (last visited Apr. 6, 2014).

96. See Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, THE GUARDIAN (Nov. 19, 2013, 7:30 AM), <http://www.theguardian.com/commensfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

97. See, e.g., Joe Mullin, “Revenge Porn” Operator Arrested, Charged with ID Theft, ARS TECHNICA (Dec. 10, 2013, 7:21 PM), <http://arstechnica.com/tech-policy/2013/12/revenge-porn-operator-arrested-charged-with-id-theft/>.

98. Ryan Grenoble, *Amanda Todd: Bullied Canadian Teen Commits Suicide After Prolonged Battle Online and in School*, HUFFINGTON POST (Oct. 11, 2012, 11:28 PM), http://www.huffingtonpost.com/2012/10/11/amanda-todd-suicide-bullying_n_1959909.html; Beth Stebner, *Audrie Pott Suicide: Details of Online Chats Emerge a Year After Teen Killed Herself Following Alleged Assault and Cyberbullying*, N.Y. DAILY NEWS (Sept. 18, 2013, 2:13 PM), <http://www.nydailynews.com/news/national/new-details-revealed-audrie-pott-cyber-bullying-suicide-article-1.1459904>.

99. See Franks, *supra* note 89.

100. Carol Kuruvilla, *Revenge Porn? Women Sue Website Charging X-Rated Pics of Them Were Uploaded on Site and Rated Without Their Knowledge*, N.Y. DAILY NEWS (Jan. 27, 2013, 9:01 AM), <http://www.nydailynews.com/news/national/website-sued-x-rated-pics-posted-women-knowledge-article-1.1248924>.

101. See Holly Jacobs, *Being a Victim of Revenge Porn Forced Me to Change My Name—Now I'm an Activist Dedicated to Helping Other Victims*, XOJANE (Nov. 13, 2013), <http://www.xojane>

hours, she began receiving lewd emails from strangers, some of whom threatened to contact her employers.¹⁰² Both her university's office of the dean and human resources department called her in for questioning.¹⁰³ Eventually, the unwanted attention forced her to change her name to distance herself from the harassment.¹⁰⁴ She left her job because she was receiving threatening emails at her work's email address and feared being physically stalked at work.¹⁰⁵ She even went so far as to purchase a stun gun for personal safety.¹⁰⁶ Jacobs's story is not unusual. Victims of NCP are routinely harassed and made to live in fear.¹⁰⁷ Because distributors often combine personal information with NCP, the fear that online harassment will evolve into real-world stalking is reasonable.

Soon after Jacobs's ex-boyfriend posted the intimate images, a Google search of Jacobs's name resulted in ten pages of search results linked to her naked photos.¹⁰⁸ The ease with which users can find NCP raises questions about the future employment prospects of NCP victims. If a Google search of a candidate's name turns up explicit images, chances are that the candidate is not even going to get called in for an interview.¹⁰⁹ NCP websites recognize that victims stand to have their reputations decimated and have moved to capitalize on this recognition. Until recently, clicking "Remove My Name" on a MyEx

.com/it-happened-to-me/revenge-porn-holly-jacobs. Apparently, Jacobs's ex-boyfriend had posted nude pictures of Jacobs on the Internet a few years previous. *See id.* In 2011, when Jacobs thought the incident was over and done with, she received an email informing her that the images were back online. *See id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web's Vilest Entrepreneur, Be Stopped?*, BETABEAT (Dec. 4, 2012, 7:46 PM), <http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/> (using the pseudonym Sarah).

106. *Id.*

107. *See* Citron & Franks, *supra* note 27, at 351.

108. Roy, *supra* note 105.

109. Explicit images of oneself on the Internet can have a detrimental effect on one's employment. An Oregon mayor was forced to step down after nude pictures of her surfaced on the Internet. Mike Celizic, *Ousted Mayor Makes No Apologies for Lingerie Photos*, TODAY (Mar. 3, 2008, 1:51 PM), http://www.today.com/id/23445683/ns/today-today_news/t/ousted-mayor-makes-no-apologies-lingerie-photos/#.UyfH—ddX1s. A former Playboy model was fired from her teaching job when the school discovered nude photos of her on the Internet. *Christy Nicole Deweese, Ex-Playboy Model, Reportedly Fired From Job as High School Spanish Teacher*, HUFFINGTON POST (Oct. 16, 2013, 11:09 AM), http://www.huffingtonpost.com/2013/10/16/cristy-nicole-deweese-reportedly-fired_n_4107751.html.

.com post redirected a victim to RemoveManager.com, where she could pay \$400 to have her name removed.¹¹⁰

The harms of NCP are powerful and disproportionately affect women. In short, NCP is a gendered issue. Overwhelmingly, women have their naked photos posted online. Women are attacked on NCP sites. Women face derogatory comments alongside their posted photos. Women are the ones who are shamed and attacked. Women are losing their jobs. Women are committing suicide. Women are told to be embarrassed and ashamed of their sexual behavior. A pervasive negative societal view of female sexuality allows these discriminatory practices to continue. Until this view changes, laws that prohibit sexually discriminatory behavior like NCP are needed.

II. The Legality of Non-Consensual Pornography

Even though only five states criminalize NCP, victims and law enforcement are not without recourse in the other forty-five states. Depending on the manner by which the distributor obtained the image, who took the image, and the harm the post caused, victims and law enforcement officers can use existing laws to sue or prosecute the distributor or, possibly, the website operator.

Some opponents of NCP criminalization argue that these existing laws are sufficient.¹¹¹ They argue that victims can sue initial distributors using the torts of public disclosure of private information or intentional infliction of emotion distress.¹¹² They argue that if the victim took the photographs herself, she owns the copyrights in the photos and can send a takedown notice to the website, requiring their removal.¹¹³ These opponents claim that law enforcement agents can even prosecute NCP website operators for violating laws applicable to pornography websites,¹¹⁴ such as 18 U.S.C. § 2257, which requires pornography websites to keep records of the names and ages of the subjects portrayed in the sexually explicit content accessible on the websites.¹¹⁵

110. *Reputation Manager*, *supra* note 74.

111. *E.g.*, Goldman, *supra* note 87; Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), <http://www.wired.com/opinion/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/>.

112. Jeong, *supra* note 111.

113. *Id.*; Digital Millennium Copyright Act, 17 U.S.C. § 512 (2012).

114. Jeong, *supra* note 111; Lux Alptraum, *Why Revenge Porn Laws Are a Bad Idea*, BOINKOLOGY 101 (Aug. 29, 2013), <https://medium.com/boinkology-101/why-revenge-porn-laws-are-a-bad-idea-e073f340cee6>.

115. 18 U.S.C. § 2257 (2012).

Certain existing civil and criminal laws apply to NCP, but since these laws are context-specific and their application depends on the unique facts of each NCP case, they are inadequate to fully address the growing harms and problems of NCP. A law that explicitly criminalizes NCP would better deter NCP distributors by sending an unmistakable message to the distributors that their behavior is both criminal and intolerable.

The following section describes several of the various laws that victims and law enforcement agents may use against NCP distributors and websites. It is intended to highlight the drawbacks of the current laws and frame the model statute proposed later in this Article.

A. Liability as a Service Provider

Section 230 of the Communications Decency Act (CDA) provides immunity to Internet service providers for the publications of third-party users.¹¹⁶ That means that even if a user posts an image illegally or without the subject's consent, the service provider has no obligation to remove the image, or even respond to a subject's request for removal.¹¹⁷

Fearful that imposing liability on service providers would stifle the growth of the Internet, Congress passed Section 230 in 1996 to protect service providers from liability for content posted by users of their platforms.¹¹⁸ Section 230 treats service providers as passive conduits that merely relay material posted or displayed by third-party users. In contrast and for purposes of liability, Section 230 distinguishes service providers from information content providers—persons or entities that are “responsible, in whole or in part, for the creation or development of information provided through the Internet”¹¹⁹ Section 230 does not immunize information content providers.

This distinction was essential to the Ninth Circuit's decision in *Fair Housing Council of San Fernando Valley v. Roommates.com*.¹²⁰ In that

116. 47 U.S.C. § 230(c)(1) (2012).

117. The CDA, however, does not immunize service providers from intellectual property law violations. As such, if a subject owns copyright in the image, a website must respond to a subject's DMCA takedown notice and remove the image. *See infra* Part II.B.2.

118. *See* Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 401 (2002); 47 U.S.C. § 230(c)(1) (“No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

119. 47 U.S.C. § 230(f)(3).

120. 521 F.3d 1157, 1162, 1175 (9th Cir. 2008).

case, the court found that the website, Roommates.com, was not entitled to Section 230 immunity when it required users to fill out a questionnaire that violated the Fair Housing Act.¹²¹ The questionnaire sought information about roommate seekers' gender, sexual orientation, and number of children.¹²² The court determined that by requiring users to answer these types of questions, Roommates.com provided and affirmatively solicited content and therefore qualified as an information content provider—an entity not entitled to Section 230 protection.¹²³ The court noted that a website may be both a service provider and an information content provider.¹²⁴

Some NCP websites could fall to the same fate as Roommates.com. If the website operator contributed to the creation of content on the site, perhaps by editing, adding, or affirmatively soliciting offending content, then Section 230 would provide no protection. Indeed, this appears to be the argument the *Toups v. GoDaddy* plaintiffs attempted in their suit against Texxxan.com and GoDaddy.¹²⁵

In 2013, Hollie Toups, the Texas woman who discovered nude photos of herself on Texxxan.com, initiated a class action suit against the website and its webhost.¹²⁶ The complaint alleged multiple causes of action for invasion of privacy and intentional infliction of emotional distress, claiming that the Texxxan.com website operators owned, and contributed to the contents of, the website.¹²⁷ The plaintiffs based GoDaddy.com's liability on the doctrine of "civil conspiracy for joining with [Texxxan.com] . . . for purposes of accomplishing" the torts alleged.¹²⁸

GoDaddy filed a motion to dismiss, which the trial court initially denied.¹²⁹ The court of appeals reversed the decision and remanded it back to the district court for a judgment in favor of GoDaddy.¹³⁰ The plaintiffs sought, but were denied, a petition for review with the Texas Supreme Court.¹³¹

121. *Id.* at 1165.

122. *Id.* at 1161.

123. *Id.* at 1165–66.

124. *Id.* at 1162.

125. See Plaintiffs' Original Petition, *Toups v. GoDaddy*, *supra* note 66, at 3–4.

126. *Id.*

127. *Id.* at 4–5.

128. *Id.* at 3–4.

129. Defendant GoDaddy.com's Motion to Dismiss, *supra* note 69.

130. *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 760–61 (Tex. App. Apr. 10, 2014).

131. Order Denying Petition for Review, *Toups v. GoDaddy.com, LLC*, No. 14-0408 (Tex. Nov. 21, 2014), available at <http://www.txcourts.gov/supreme/orders-opinions/november-21,-2014.aspx>.

The plaintiffs and their attorney strove to have the court find GoDaddy, a major service provider, liable for the NCP, but failed to convince the court that Section 230, which has been in place for nearly twenty years with no hint of amendment,¹³² should not apply. As to Texxxan.com, if the case proceeds, the plaintiffs' most promising option would be to convince the court to apply the reasoning in *Roommates.com* and find that Texxxan.com affirmatively contributed to the development of the website and therefore acted as an information content provider.

When there is no evidence of contribution or co-development, NCP websites can rely on Section 230's immunization. For instance, in *Barnes v. Yahoo!*,¹³³ Cecilia Barnes brought suit against Yahoo! after discovering—through unknown men contacting her at her work with the expectation of sex—that her nude photos were online.¹³⁴ Barnes realized that her ex-boyfriend had created a fake Yahoo! profile and used a nude image of her as the profile picture.¹³⁵ Barnes sent numerous letters to Yahoo! requesting removal of the images and explaining that she had not consented to their use.¹³⁶ When Yahoo! failed to remove the images, Barnes brought suit against the web giant.¹³⁷ The district judge dismissed the suit, finding that Section 230 prevented Yahoo! from being treated as the publisher of the photos and that Yahoo! was thus immune from liability for the non-consensual posting of the photos.¹³⁸

Depending on whether the website operators contribute to NCP websites, Section 230 may or may not immunize them from liability for the content on their websites. Though a court has yet to determine that a NCP website is an information content provider not entitled to Section 230 immunity, the argument has not been foreclosed.

132. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003); *Doe v. MySpace*, 528 F.3d 413, 418 (5th Cir. 2008). But see *Fair Housing Council of San Fernando Valley v. Roommates .com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (limiting the broad immunity granted to service providers by Section 230 by finding that a website acted as an information content provider).

133. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

134. *Id.* at 1098.

135. *Id.*

136. *Id.*

137. *Id.* at 1099.

138. *Barnes v. Yahoo!, Inc.*, No. 05-926-AA, at 9–10 (D. Or. Nov. 8, 2005). On appeal, the Ninth Circuit found that Barnes had a cause of action against Yahoo! on the basis of promissory estoppel. *Barnes*, 570 F.3d 1096, 1109. A Yahoo! employee had told Barnes that the company would remove the images, but Yahoo! took no action. *Id.* at 1099.

B. Civil Law Claims and Hurdles

While some NCP victims have the option of bringing a civil suit against their aggressors, the civil route is not a viable option for many others. Without counting the significant time and money that must be spent filing suit, victims also face hurdles when choosing who to sue and proving their claims. Victims may also be reluctant to commence a lawsuit because it would bring further attention to the intimate images they are trying to remove from the Internet. Further, many lawyers have yet to take NCP claims seriously and refuse to take the cases on a contingency basis.¹³⁹ And, even if a victim were to win a civil suit against the distributor, as just discussed, the perpetrator would likely not even have the resources to pay damages. Section 230 likely protects the actors with the resources—the service providers, the Hunter Moore’s, the Kevin Bolleart’s—from liability.

1. Tort Law

At first glance, tort law seems the most applicable avenue for NCP victims.¹⁴⁰ A victim could bring a claim of intentional infliction of emotional distress (IIED) or invasion of privacy.¹⁴¹ A jury in Texas, for instance, recently awarded a woman \$500,000 for emotional distress after her ex-boyfriend posted intimate photos and Skype sessions online.¹⁴² The defendant’s attorney, however, has stated that his client may never have the resources to pay the award, meaning the woman will have footed the bill for an award-less lawsuit.¹⁴³

Additionally, in a 2012 Jane Doe case, *Doe v. Hofstetter*, a woman was awarded \$105,000 under an IIED claim after a judge determined that the defendant’s behavior was extreme and outrageous.¹⁴⁴ The defendant created a blog where he published intimate photos of Jane Doe.¹⁴⁵ He also uploaded the photos to other websites and distributed

139. Michael L. Baroni, *New “Revenge Porn” Law Is Impotent*, OC LAWYER (Feb. 2014), <http://www.virtualonlineeditions.com/article/+New+%E2%80%9CRevenge+Porn%E2%80%9D+Law+Is+Impotent/1620323/0/article.html>.

140. See *Doe v. Hofstetter*, No. 11-cv-0209-DME-MJW, 2012 WL 2319052, at *5–6 (D. Colo. June 12, 2013) (order granting default judgment and setting hearing).

141. See, e.g., *id.*

142. Brian Rogers, *Jury Awards \$500,000 in ‘Revenge Porn’ Lawsuit*, HOUSTON CHRONICLE (Feb. 21, 2014, 10:33 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php>.

143. *Id.*

144. *Hofstetter*, 2012 WL 2319052, at *7–8; *Doe v. Hofstetter*, No. 11-cv-2209-DME-MJW, 2012 WL 3398316, at *1 (D. Colo. Aug. 14, 2012) (order granting relief).

145. *Hofstetter*, 2012 WL 2319052, at *2.

them to third parties.¹⁴⁶ The defendant posted false statements about Doe and her husband on his blog and emailed both Doe and her husband the intimate photos with the intent of harassing and interfering with their marriage.¹⁴⁷ The defendant attempted to contact Doe by email, cell phone, and through Twitter.¹⁴⁸ After receiving a letter to cease all communication with Doe, the defendant continued to email Doe harassing letters.¹⁴⁹ He created a Twitter account under Doe's name, distributing intimate photos and posting messages as Doe.¹⁵⁰ Doe contacted Twitter to have the account removed, and the defendant created a second Twitter account in her name.¹⁵¹ The court found that Doe suffered severe emotional distress and that the defendant was well aware of that fact, as Doe had sent him multiple letters demanding that he cease contacting her.¹⁵²

Hofstetter represents an atypical NCP case. The defendant not only posted pictures of the victim multiple times and on multiple sites, he also created fake social media accounts in the victim's name and sent the victim harassing messages.¹⁵³ His behavior rose to the standard of "outrageous," an element necessary for a successful IIED claim, but most NCP distributors are not as aggressive. Only the most egregious cases of NCP could successfully meet the IIED standard, and the malleable, uncertain standard turns filing suit into a costly and time-consuming risk.

The difficulties behind an IIED claim are twofold. First, the victim must establish that the perpetrator's behavior was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."¹⁵⁴ Second, the victim must prove that such behavior actually caused extreme emotional distress.¹⁵⁵

Think back to the hypothetical Amy and Ben—the participants in the "typical" NCP incident. One night, Ben posted two images of Amy on a revenge porn site. It was a one-time event. He never contacted Amy; he was not trying to break up Amy and her new boyfriend; he

146. *Id.*

147. *Id.* at *2–3.

148. *Id.* at *3.

149. *Id.*

150. *Id.*

151. *Id.* at *3–4.

152. *Id.* at *7.

153. *Id.* at *2–4.

154. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

155. *Id.* § 46(1).

was not pretending to be Amy. Based on existing case law, it is unlikely that Ben's post would rise to the level of "outrageousness" required of an IIED claim.

NCP victims may also find success under a tort claim for invasion of privacy.¹⁵⁶ State invasion of privacy laws vary, but they generally prohibit the publicity of "a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."¹⁵⁷ One woman successfully established invasion of privacy after her ex-husband posted photocopies around her neighborhood of nude images taken of her during their marriage.¹⁵⁸ The husband argued that because the woman consented to the initial taking of the photographs without asking what he intended to do with them, and took no steps to obtain the photographs during or after their divorce, her actions constituted waiver, and she could not claim invasion of privacy.¹⁵⁹ The court rejected the argument, finding the woman did not consent to the publication of the photographs.¹⁶⁰ The court was not willing to infer consent to publication from consent to being photographed.

Tort claims remain a viable option for NCP victims. However, the significant time and financial expenses associated with filing suit, along with the likelihood that the defendant cannot afford damages, means that, for many NCP victims, bringing such a claim is not a viable option.

2. Copyright Law

Copyright law, applicable when the photo is a selfie, taken by the victim and sent to the distributor, may offer relief for some NCP victims. Copyright law protects any original work of authorship fixed in a tangible medium of expression.¹⁶¹ In other words, the person who takes a photo or captures an image is the copyright owner of that image. Authors have the right to control or prohibit distribution of their

156. See Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 433–34 (2014).

157. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

158. See *Cheatham v. Pohle*, 789 N.E.2d 467, 470 (Ind. 2003) (assessing the constitutionality of the state's punitive damages statute after Cheatham was awarded \$100,000 in compensatory damages and \$100,000 in punitive damages for her invasion of privacy and intentional infliction of emotional distress claims).

159. *Pohle v. Cheatham*, 724 N.E.2d 655, 658–59 (Ind. Ct. App. 2002).

160. *Id.* at 661.

161. 17 U.S.C. § 102 (2012).

work.¹⁶² The selfie taker, as the person in charge of her photo, may prohibit others from distributing (or posting) her image without her authorization.

Section 230 does not immunize websites and service providers from copyright infringement claims. Rather, the Digital Millennium Copyright Act (DMCA) provides a safe harbor for websites that remove infringing items upon learning that their websites are hosting infringing materials.¹⁶³ Once the provider receives a complaint from the author, the website is obligated to remove the photo or face liability as a secondary infringer.¹⁶⁴

Copyright law is clearly a possibility for some NCP victims. Indeed, a survey of 864 victims indicates that 80% of NCP images are “self-shots,”¹⁶⁵ meaning the subject is the author and thus copyright holder. This large percentage suggests that copyright law is a viable option for many victims. Unfortunately, copyright law does not protect victims in scenarios where they do not take the pictures themselves. It does not protect Amy if Ben took an intimate photo while she posed for him. It does not protect Amy if Ben took a photo of her while she was sleeping. It does not protect Amy if Ben hacked into Amy’s computer to obtain sexually explicit images that Amy herself did not take.

Moreover, there is no guarantee that a website will comply with a request to take down a photograph. Website operators recognize that most victims cannot afford to hire a lawyer, so they are not likely to worry about being sued.¹⁶⁶ Further, Amy would not be entitled to statutory damages for the unauthorized distribution of her photo if she brought Ben or the website where he posted the images to court unless she had registered the image with the Copyright Office.¹⁶⁷ Her remedy would be limited to the removal of her photo and actual damages—an award that likely would not cover the costs of litigation or even the costs of simply filing a complaint.¹⁶⁸

162. 17 U.S.C. § 106(3) (2012).

163. *See* 17 U.S.C. § 512(c) (2012).

164. *Id.*

165. Press Release, Cyber Civil Rights Initiative, Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims (Sept. 10, 2013), http://www.cybercivilrights.org/press_releases [hereinafter Press Release].

166. Citron & Franks, *supra* note 27, at 360.

167. *See* 17 U.S.C. § 412 (2012) (prohibiting statutory damages for unregistered works).

168. *See id.*

3. Sexual Harassment

A sexual harassment suit can be brought if the harassing behavior occurs in the workplace.¹⁶⁹ NCP generally occurs outside of employment and educational settings—subjects find it splayed out across the boundless expanse of the Internet. However, a NCP victim could potentially file a suit for sexual harassment upon discovering that her co-workers, employer, school administrators, or fellow students posted or accessed the image. She might also have a claim if her employer were to discharge her after discovering the intimate images.

C. Criminal Law Charges and Hurdles

Using criminal law to prosecute NCP distributors alleviates the problems caused by the significant time and cost barriers that accompany civil claims. Further, criminal law allows law enforcement agents, rather than victims, to go after the NCP distributor. This trait benefits NCP victims, who do not want to call further attention to the NCP images of themselves, and likely want to avoid the attention and publicity that comes along with filing a civil claim. Depending on the situation, prosecutors might be able to use the following criminal laws against certain NCP distributors.

1. Computer Fraud and Abuse Act

The FBI relied on the Computer Fraud and Abuse Act (CFAA)¹⁷⁰ to arrest Hunter Moore, the founder of IsAnyoneUp.com.¹⁷¹ The CFAA criminalizes various forms of hacking and the unauthorized access to computers.¹⁷² Moore allegedly paid a man to break into the accounts of hundreds of women to steal sexually explicit photos, which Moore then uploaded to his website.¹⁷³ Moore was indicted because he illegally accessed and obtained photos on others' computers¹⁷⁴—it was immaterial that the photos were sexually explicit. The charges would apply no matter the subject matter of the photos he managed to steal.

169. 29 C.F.R. § 1604.11 (2014).

170. 18 U.S.C. § 1030 (2012).

171. Russell Brandom, *Revenge Porn Magnate Hunter Moore Has Been Arrested by the FBI*, THE VERGE (Jan. 23, 2014, 2:38 PM), <http://www.theverge.com/2014/1/23/5338694/revenge-porn-magnate-hunter-moore-has-been-arrested-by-the-fbi>.

172. 18 U.S.C. § 1030.

173. Moore Indictment, *supra* note 16, at 3.

174. *Id.* at 11.

Many are applauding this new method of arresting NCP perpetrators.¹⁷⁵ And, indeed, prosecutors could use the CFAA against distributors who hack into women's computers to obtain sexually graphic images. One survey estimates that up to 40% of NCP is obtained through hacking.¹⁷⁶ If this number is correct, then the CFAA is a strong weapon for prosecutors to use against NCP distributors.

2. Video Voyeurism Prevention Act

The Video Voyeurism Prevention Act (VVPA) makes it a misdemeanor for a person to capture an image of an individual's private area without that person's consent, and to do so "under circumstances in which the individual has a reasonable expectation of privacy."¹⁷⁷ The VPAA is thus another possible option for criminal prosecution, applicable when the distributor captures a photo without the subject's knowledge or consent. But since most NCP consists of selfies, photos captured by the subject herself,¹⁷⁸ or images that the subject allowed the distributor to capture, law enforcement can only rely on the VVPA in limited situations.

3. Anti-Harassment

Statutes that prohibit harassing behavior online may apply to some instances of NCP.¹⁷⁹ Typically, however, the distributor must engage in some sort of behavior, or a pattern of behavior, with the intent to frighten, harass, or threaten the victim.¹⁸⁰ Cyber harassment would occur only if the distributor were persistent in his behavior—Ben's

175. See, e.g., Evan Brown, *Hunter Moore Arrest Reveals a Certain Schizophrenia About the Computer Fraud and Abuse Act*, INTERNETCASES (Jan. 24, 2014), <http://blog.internetcases.com/tag/revenge-porn/>; Kashmir Hill, *The Cyber Prosecutor Sending Nude-Photo Thieves to Prison*, FORBES (July 31, 2014, 10:28 AM), <http://www.forbes.com/sites/kashmirhill/2014/07/31/federal-prosecutor-nude-photo-hackers/>.

176. Levendowski, *supra* note 23.

177. 18 U.S.C. § 1801 (2012).

178. Press Release, *supra* note 165.

179. See, e.g., CAL. CIV. CODE § 1708.7(a) (West 2009) ("A person is liable for the tort of stalking when the plaintiff proves all of the following elements of the tort, [including] . . . [t]he defendant engaged in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff. . . . [and] [a]s a result of that pattern of conduct, the plaintiff reasonably feared for his or her safety"); CAL. PENAL CODE § 422 (West 2014) ("Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made . . . by means of an electronic communication device, is to be taken as a threat . . . caus[ing] that person reasonably to be in sustained fear for his or her own safety . . . shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.").

180. See, e.g., *People v. Barber*, No. 2013NY059761, at *4 (N.Y. Crim. Ct. Feb. 18, 2014).

one time post of Amy would not qualify. But if Ben were to post multiple images of Amy, persistently call and email her, and leave harassing or threatening voicemails and online comments, then law enforcement agents might be able to prosecute Ben under a cyber harassment law.¹⁸¹ Unfortunately, NCP victims have run into problems when trying to convince police officers to take their fear or complaints seriously.¹⁸² Further, officers often refuse to involve themselves in NCP cases due to the belief that the woman caused the incident by sharing an intimate photo in the first place.¹⁸³

D. State Statutes

Five states—New Jersey, California, Utah, Idaho, and Wisconsin—have passed statutes that criminalize NCP.¹⁸⁴ Unfortunately, the New Jersey, Idaho, and Wisconsin statutes would not likely withstand a First Amendment challenge because they overly restrict speech.¹⁸⁵ Though California's statute could likely withstand such a challenge, it covers only a narrow range of behavior: most NCP does not fall under the statute.¹⁸⁶ Utah's statute, which shares the same essential elements as the model statute proposed later in this Article, represents the best NCP criminalization statute. The following sections discuss the pros and cons of the various statutes.

1. The New Jersey, Idaho, and Wisconsin Statutes

In 2004, New Jersey enacted a statute prohibiting the disclosure of any image of another person whose "intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person consented to such disclosure."¹⁸⁷ A violation of the

181. See, e.g., CAL. PENAL CODE §§ 422, 653.2, 653m (West 2014).

182. Michelle Dean, *The Case for Making Revenge Porn a Federal Crime*, GAWKER (Mar. 27, 2014, 2:45 PM), <http://gawker.com/the-case-for-making-revenge-porn-a-federal-crime-1552861507>.

183. See Danielle Citron, *How to Make Revenge Porn a Crime*, SLATE (Nov. 7, 2013, 1:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/making_revenge_porn_a_crime_without_tramplng_free_speech.html.

184. N.J. STAT. ANN. § 2C:14-9 (West 2014); CAL. PENAL CODE § 647(j)(4) (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014); IDAHO CODE ANN. § 18-6609 (2014); WIS. STAT. § 942.09(3m)(a) (2014).

185. See Mark Bennett, *Are Statutes Criminalizing Revenge Porn Constitutional?*, BENNETT & BENNETT BLOG (Oct. 14, 2013), <http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional.html>.

186. See Eric Goldman, *California's New Law Shows It's Not Easy to Regulate Revenge Porn*, TECHNOLOGY & MARKETING LAW BLOG (Oct. 16, 2013), http://blog.ericgoldman.org/archives/2013/10/californias_new_1.htm.

187. N.J. STAT. ANN. § 2C:14-9(c) (West 2015).

statute could result in a three- to five-year jail sentence or up to a \$30,000 fine.¹⁸⁸

The Wisconsin statute, similar in language and signed into law on April 8, 2014, criminalizes the dissemination of a “representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct” without the consent of the person represented.¹⁸⁹ A violation could result in a fine of \$10,000 or nine months imprisonment, or both.¹⁹⁰

The Idaho statute, signed into law on March 19, 2014, makes the intentional dissemination of an image containing the intimate areas of another person a felony when the image was made without the said person’s consent and when one or both parties understood that the image would remain private.¹⁹¹ A violation of the statute could result in up to five years of jail time or a \$50,000 fine, or both.¹⁹²

Although the statutes are broad in scope and apply to most forms of NCP, they ultimately suffer from significant problems.

First, the statutes cover too much conduct. The statutes could apply not only to NCP, but also to many other less objectionable acts. For instance, if Amy were to text Ben an intimate selfie, and Ben were to simply show it to his best friend while out at a bar, Ben could be charged under the statutes. While Amy might not appreciate Ben’s behavior, his actions do not seem offensive enough to warrant the possibility of five years in jail or a \$50,000 fine,¹⁹³ or even nine months in jail and a \$10,000 fine.¹⁹⁴

The statutes could also apply if, while walking to the bar, Ben passed a woman standing topless on the street, snapped a photo while she flashed a smile, and showed the image to his best friend or posted it online. There is something unsettling about holding Ben responsible for sharing an image of the “intimate parts” of a woman when the woman herself bared her bare top to the public. The situation is vastly different from one in which Ben takes a photo of Amy while the two are sharing an intimate moment as a couple. Amy has a rightful expect-

188. *Id.*; *id.* § 2C:43-6(3) (West 2015).

189. WIS. STAT. §§ 942.09(1)(bn), (3m)(a) (2014); Andrew Hahn, *Gov. Scott Walker Signs 62 Bills into Law*, THE DAILY CARDINAL (Apr. 9, 2014, 12:18 AM), http://host.madison.com/daily-cardinal/gov-scott-walker-signs-bills-into-law/article_5aaa7026-bfa6-11e3-a44d-001a4bcf887a.html.

190. § 942.09(3m)(a); WIS. STAT. § 939.51(3)(a) (2014).

191. IDAHO CODE ANN. § 18-6609(2)(b) (2014).

192. *Id.* § 18-112.

193. *Id.*

194. WIS. STAT. § 942.09(3m)(a); *id.* § 939.51(3)(a).

tation of privacy in those images shared in the course of a relationship, while the woman on the street had no such expectation when exposing herself on a public street.

The New Jersey and Idaho statutes could even apply to someone who exposed matters of legitimate public interest—such as the journalists who exposed pictures of Anthony Wiener’s crotch area or pictures revealing evidence of a sex crime.¹⁹⁵

Second, the three statutes likely run afoul of the First Amendment¹⁹⁶ by overly restricting free speech. While the Supreme Court has recognized that certain types of speech—defamation, child pornography, fraud, obscenity, incitement to criminal activity, and speech integral to criminal conduct—are undeserving of First Amendment protection,¹⁹⁷ NCP is not one of them. Under the reasoning of the 2010 case of *United States v. Stevens*, it is unlikely that a plaintiff could successfully argue that NCP should not receive First Amendment protection. In *Stevens*, the Supreme Court overturned a federal statute that made it a crime to create, sell, or possess “crush videos.”¹⁹⁸ Crush videos feature the intentional killing of helpless animals—generally, a woman in high heels crushes a kitten or puppy to death with her stiletto.¹⁹⁹ If the Supreme Court is unwilling to cede First Amendment protection to the posting of horrific depictions of intentional animal killing, it is unlikely to cede such protection to NCP. In *Stevens*, the Justices appeared to be offended by what they considered the government’s argument that courts should engage in a “highly manipulable” categorical balancing test that weighed the pros and cons of particular types of speech.²⁰⁰ The Court was unwilling to uphold a statute that prohibited the dissemination of truthful information, regardless of how offensive such information may be.

Since NCP is generally a lawfully obtained, accurate (not false or defamatory) depiction of an individual, it is likely speech entitled to First Amendment protection. The New Jersey, Wisconsin, and Idaho statutes therefore likely violate the First Amendment by criminalizing the distribution of protected speech. The statutes lack an element of

195. Cf. The Wisconsin statute contains an exception for individuals who distribute intimate images that are “newsworthy or of public importance.” WIS. STAT. § 942.09(3m)(b)(3).

196. U.S. CONST. amend. I.

197. See *United States v. Stevens*, 559 U.S. 460, 468 (2010); *New York v. Ferber*, 458 U.S. 747, 764 (1982).

198. *Stevens*, 559 U.S. at 482.

199. See *id.* at 465.

200. *Id.* at 470, 472.

intent. If the statutes were to focus on the intent of the distributor when uploading the image, they would no longer implicate free speech concerns.²⁰¹ Rather, liability would turn on the distributor's intent when distributing the image, not just on the content or ideas (speech) contained in the image.

2. California's Statute

California's NCP statute makes it a misdemeanor to photograph "the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress."²⁰² The law has many benefits. First, it applies when a NCP distributor distributes the image of another's intimate parts when that person understood the image would remain private. It also covers the form of NCP that copyright law does not cover—instances in which the person who posts the photo or video holds the copyright in it, depriving the subject of the right to send takedown notices under the DMCA.

While the law, which went into effect at the start of 2014, is a step toward solving the NCP problem—by recognizing and treating revenge porn as a criminal act—as written, the law has a serious limitation. The law does not cover selfies.²⁰³ If Amy had taken a photo of herself in the mirror and sent it to Ben, the photograph would not be covered. Of course, Amy could still use her copyright to send a takedown notice to the website where Ben uploaded the image, but law enforcement could not prosecute Ben for his actions. Since more than 80% of NCP are self-shots sent to the distributor,²⁰⁴ California's law is largely inapplicable.²⁰⁵

201. ACLU of Maryland, Testimony for the House Judiciary Committee on H.B. 43 (Jan. 28, 2014), http://www.aclu-md.org/uploaded_files/0000/0497/hb_43_-_revenge_pornography.pdf (arguing that, in order to be constitutional, "revenge porn" laws must include proof of an intent to cause harm); Liz Halloran, *Race to Stop "Revenge Porn" Raises Free Speech Worries*, NPR (Mar. 6, 2014) (interviewing Lee Rowland of the ACLU) ("Legislation that can withstand court scrutiny, Rowland says, . . . must designate that the perpetrator had malicious intent. . . .").

202. CAL. PENAL CODE § 647(j)(4)(A) (West 2014).

203. *See id.* (applying only to "[a]ny person who photographs or records" an image of another).

204. Press Release, *supra* note 165.

205. At the time this Article went to print, the California Legislature had just passed a bill broadening the scope of California's current NCP statute. *See* S.B. 1255, 2014 Reg. Sess. (Cal. 2015) (amending CAL. PENAL CODE § 647). The revised law, which went into effect on

3. Utah's Statute

On March 29, 2014, Utah passed a law criminalizing NCP.²⁰⁶ The law prohibits the distribution of intimate images with the intent to cause emotional distress or harm when (1) the distributor knows the subject of the image did not consent to distribution, (2) the image was created by or provided to the distributor under circumstances in which the subject has a reasonable expectation of privacy, and (3) actual emotional distress or harm occurred.²⁰⁷ The statute contains exceptions for lawful practices of law enforcement, images of subjects who voluntarily allow public exposure of the image, and images used in a lawful commercial setting.²⁰⁸

There are many positive aspects to Utah's statute. First and foremost, the statute does not overly restrict speech. The statute does not simply criminalize speech (media containing sexually graphic images) alone, it also contains a non-speech element (intent to cause harm).²⁰⁹ Liability under the statute depends on the intent of the distributor—he must intend to cause emotional distress or harm.²¹⁰ The statute thus would not apply to Ben when he showed the image of Amy or the topless woman on the street to his friend. Second, the statute applies regardless of who captured the image.²¹¹ It would apply whether Amy sent Ben a selfie or Ben took a photo of Amy. Third, the statute contains exemptions for certain types of behavior. The one exemption the statute lacks, though, is an exemption for images of public concern or newsworthiness. The following model statute contains many of the same elements of Utah's statute, adding in, among other elements, a newsworthiness exception.

III. Model Statute

It is time for every state to pass legislation criminalizing NCP. Criminalizing the act will allow law enforcement to go directly after

January 1, 2015, criminalizes the nonconsensual distribution of sexually explicit images that were intended to be private, regardless of who captured the image. *Id.* In other words, it covers selfies. Another California law, which takes effect on July 1, 2015, will allow NCP victims to seek damages from the distributor in civil court. A.B. 2643, 2014 Reg. Sess. (Cal. 2015) (to be codified at CAL. CIV. CODE § 1708.85).

206. UTAH CODE ANN. § 76-5b-203(2) (West 2014).

207. *Id.*

208. *Id.* § 76-5b-203(3)(a)–(c).

209. See *In re Kaleb K.*, No. 2012AP839, 2013 WL 6182562, at *3 (Wis. Ct. App. Nov. 27, 2013); ACLU of Maryland, *supra* note 201.

210. UTAH CODE ANN. § 76-5b-203(2).

211. See *id.* § 76-5b-203(2)(b).

the perpetrator, relieving victims from spending their own time and money filing civil suits with uncertain results. Criminalization will also relieve victims, women who want to distance themselves from the intimate images, of the publicity that follows filing suit. Although current criminal laws apply in various NCP scenarios, the model statute encompasses those instances not yet covered by law. The following model statute effectively criminalizes various forms of NCP while satisfying First Amendment scrutiny.

Model Statute:

A person commits a criminal act if, with the intent to coerce, harass, or intimidate, or with the intent to cause others to coerce, harass, or intimidate, he or she intentionally widely distributes any sexually explicit video, photograph, or other media that depicts an image of another person with his or her intimate parts exposed or engaged in an act of sexual contact, when such person knows or has reason to know that he or she is not authorized to distribute said video, photograph, or other media, and the person depicted had a reasonable expectation that the image would be kept private.

This law does not apply to:

- (1) Lawful and common practices of law enforcement, the reporting of unlawful conduct or legal proceedings;*
- (2) Images of public concern or newsworthiness;*
- (3) Situations involving voluntary disclosure in a public or commercial setting.*

Definitions:

- (1) "Intimate parts" means the naked genitals, pubic area, buttocks, or female nipple.*

IV. Benefits of the Model Statute

The following section explains why the model statute is better than current laws in addressing the growing harm of NCP, while staying within the bounds of the First Amendment. That is not to say that current laws are useless or ineffective when it comes to NCP. Rather, the model statute means to add to those laws already in place. Further, as explained, criminalizing NCP would improve the gender inequality on the Internet.

A. How the Model Statute Is Better than Current Legislation

The model statute applies directly to NCP and is thus better suited to deal with NCP than current legislation. As described earlier,

certain laws already exist for NCP victims to sue the distributor or to attempt to make the service provider remove the images.²¹² But these laws do not comprehensively address the various forms NCP might take. The particular law a victim could use, if any, depends on the specific facts of each incident.

First, the model statute sidesteps the issues posed by civil law hurdles.²¹³ Unlike tort law, which requires the victim to expend considerable time and money going after a defendant that might not have the resources to pay damages,²¹⁴ the model statute allows law enforcement to target the distributor. This would notably advance NCP prosecutions, where the victims are generally “young and female” and the distributors are “male and young,”²¹⁵ meaning that the victims cannot afford legal help and the distributors cannot afford damages. Criminalization also saves the victim of the NCP from involving herself in a lengthy trial, further exposing her name alongside the images from which she wants to distance herself. Further, unlike copyright law, which would only apply if the subject took the posted photo herself, the model statute applies both to selfies and images captured by others.²¹⁶

The model statute also improves on current criminal law. While the CFAA is only applicable if the distributor hacked into the subject’s computer to steal the image, and the VVPA is only applicable if the photo was taken non-consensually, the model statute applies regardless of the manner in which the distributor obtained the image and regardless of whether the photo was taken consensually.²¹⁷

Finally, the model statute better serves NCP victims than current state NCP statutes. Unlike the New Jersey, Wisconsin, and Idaho statutes, the model statute does not suffer from a First Amendment problem because liability does not depend on the content of the speech. Liability under the model statute does not turn on the content of the

212. See *supra* Part II.A–B.

213. Because it does not appear likely that Congress will modify Section 230 of the CDA, the model statute applies to those who upload the NCP, not the website operators that host the images. Thus, the statute does not impose liability on providers beyond what the CDA permits.

214. See *supra* Part II.B.1.

215. Lorelei Laird, *Victims Are Taking on ‘Revenge Porn’ Websites for Posting Photos They Didn’t Consent to*, A.B.A. J. MAG. (Nov. 1, 2013, 9:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/.

216. See *supra* Part II.B.2.

217. See *supra* Part II.C.

images, but rather on the intent of the distributor.²¹⁸ A distributor will be liable under the model statute only if he posts the sexually explicit images with the *intent* to “coerce, harass, or intimidate” the subject.

Unlike a statute that only applies when the distributor captures the image himself, the model statute applies regardless of who took the photo. Under the model statute, an individual violates the statute whether he posts an image he took himself or received the image from the subject or a third party.

Further, the model statute covers appropriately culpable conduct. The model statute exempts the distribution of photos used for law enforcement, images of public concern or newsworthiness, and images that involve voluntary or commercial situations.²¹⁹

Though the model statute more clearly and comprehensively addresses NCP than current civil and criminal state and federal laws, it is not perfect. For instance, a person could attempt to evade the law by claiming that he lacked the intent to coerce, harass, or intimidate the subject. He could argue that he posted the image to simply show off his “conquest” or to draw web traffic to his site. The law would simply not apply unless there was evidence that the person posted the image with malicious intent.

Law enforcement may also have trouble proving that the person depicted “had a reasonable expectation that the image would be kept private.” If a young woman sends a sexually explicit photograph to her partner over text or email, some commentators have argued that she gave up her expectation of privacy in the image.²²⁰ But posing for a lover is not posing for the world, and the model statute represents a step toward eliminating the harms caused by NCP.

B. The Model Statute Affects the Broader Harm of Gender Inequality

The unique harms women feel when their intimate images are posted online remain largely overlooked. NCP is very much a gendered phenomenon—the majority of NCP victims are women, and as such, women receive threatening, hateful, and demeaning

218. *In re Kaleb K.*, No. 2012AP839, 2013 WL 6182562, at *3 (Wis. Ct. App. Nov. 27, 2013); ACLU of Maryland, *supra* note 201.

219. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (“[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest”); UTAH CODE ANN. § 76-5b-203 (2014).

220. See, e.g., Goldman, *supra* note 87; Sam Biddle, *Here’s Where the Naked Pics You Sexted Will End Up*, GIZMODO (Nov. 28, 2012, 9:32 AM), <http://gizmodo.com/5963883/heres-where-the-naked-pics-you-sexed-will-end-up>.

messages when their photos are viewed. This harassment profoundly affects female victims of NCP.

First, it affects their employment opportunities.²²¹ NCP subjects have lost jobs or job opportunities, either because they found it too humiliating to continue in a job where their co-workers had seen them nude or because prospective employers vetted them out of the interview process after compromising images arose during a Google search.²²²

Second, NCP greatly affects women's personal lives. Some women move towns to evade harassment,²²³ and one woman even changed her name.²²⁴ NCP is detrimental to victims' mental health. It causes extreme emotional distress, leading some women to fear going out in public, and more than one to commit suicide.²²⁵

By enacting a statute that explicitly criminalizes NCP, legislators would take a clear stand against gender inequality. Women are overwhelmingly the victims of NCP,²²⁶ and the current failure to meaningfully criminalize NCP represents a great disservice to women.

Because NCP is a gendered issue, ignoring it implies that the harms female subjects suffer are too trivial to require a law prohibiting the behavior. By enacting a law that criminalizes the various forms of NCP, legislatures will be boldly declaring that NCP is not acceptable.

Conclusion

NCP is a growing problem that necessitates a legal response—NCP is not going away. Current laws can be used against NCP distributors and websites, but a statute explicitly criminalizing NCP would better address the problem. The model statute in this Article comprehensively and constitutionally criminalizes the act of posting sexually explicit photos of individuals to the Internet without their consent, and thereby provides NCP victims and law enforcement agents with a law that will deter the distributors from continuing their behavior.

221. See *supra* Part I.B.

222. *Id.*

223. Elise Dimer, *Lawmakers Propose Ramping up Protection on 'Revenge Porn,'* CHI. SUN-TIMES (Feb. 20, 2014, 12:10 PM), <http://chicago.suntimes.com/politics/7/71/169362/lawmakers-propose-ramping-up-protection-on-revenge-porn/>.

224. Jacobs, *supra* note 101.

225. See *supra* Part I.B.

226. See discussion *supra* Part I.B.